



also bypassed. The appellant highlights that he was elected vice president of his local union in June 2016. He describes an incident in June 2016 where he submitted a slip for one hour of overtime and claims that Puentes was irritated by this. After an investigation, the appellant and other personnel received disciplinary action or counseling. In September 2016, the appellant presents that he sent messages to Sergeant Michael Scuzzese regarding training and compensation for such events and he received a response that his training for an event was cancelled and, aside from two events in 2016, he has not received any training or professional growth opportunities. The appellant explains that in September 2014 he was selected to be a Computer Technician/IT Liaison. However, he never received the training for this position, was told in July 2016 that the Sheriff's Office was going in another direction, and another individual was eventually appointed. The appellant describes other grievances that he filed on behalf of his union in 2016 and 2017. He notes that although the appointing authority indicates it took into account Blohm's and his performance evaluations and disciplinary history from 2012 to 2016 in making its decision, he has not been provided these evaluations. Further, he states that performance evaluations do not contain any percentage scores, so he does not know how the appointing authority can attach a percentage rank to them now. Finally, the appellant claims that Blohm did have major disciplinary action against him.

In response, the appointing authority, represented by Natalia V. Shishkin, Esq., states that Blohm and the appellant were interviewed by Puentes and Lieutenant John Bannon for a position in the subject title, both candidates were asked the same questions and Puentes and Bannon both scored Blohm higher on the interview. Specially, Bannon concluded that the appellant's answers were "convoluted and unsure at times" while Blohm's responses were "clear, concise and confident in his answers" and "well explained." Puentes commented that Blohm's answers were "confident, poised, professional and answered all questions posed to him in a supervisory nature." Additionally, the appointing authority presents that between 2012 and 2016, Blohm received an 8.75% out of 10% for his performance evaluations while the appellant's overall performance was a 6.25%. It noted that neither candidate had discipline from 2012 to 2016. Consequently, as Blohm had higher interview and performance evaluations, he was chosen for the promotion, which was in the appointing authority's discretion under the Rule of Three. The appointing authority emphasizes that the interview was the most important part of the selection process as the interview was intended to assess the candidates' personal characteristics and motivation, as well as to test their knowledge of the rules and processes that Sergeants are required to know to enforce and supervise. It presents that the appellant appeared at the interview in a mismatched uniform, avoided eye contact, looked down, at times closed his eyes when responding to questions, answered substantive questions in an uncertain manner and answered inaccurately and/or incompletely. Conversely, Blohm was in the full and correct uniform, presented the interviewers with copies of his resume, answered all

questions clearly and with confidence and, most importantly, described all the key steps/requirements in the procedures he was questioned about and appeared ready to act as a shift supervisor. The appointing authority did take into consideration that Blohm was disciplined in 2011; however, it asserts that this discipline took place so long ago that it had no bearing on Blohm's ability to serve as Sergeant. Similarly, it presents that it chose to disregard a recent counseling notice the appellant received in 2016. However, the appointing authority states even if it deducted the maximum amount to Blohm's overall performance due to his prior discipline, his score would still be higher than the appellant's. The appointing authority indicates that the appellant's union involvement had no bearing on its decision to bypass him and points out that Puentes and Bannon, who made the decision, are also members of the union and Bannon has held the position of union vice president. It highlights certain specialized assignments that Puentes supported the appellant's candidacy for and that Puentes personally met with the appellant to give him feedback to help prepare the appellant for the next promotion opportunity. It emphasizes that any animosity that existed between Farsi and the appellant was irrelevant because Farsi is no longer with the Sheriff's Office and he played no role in the decision to promote Blohm. The appointing authority presents that the appellant was disciplined for the 2016 incident the same as "all personnel involved in that incident", that certain training was cancelled for all members, and the Sheriff's Office made an internal decision that the IT Liaison should be assigned to administrative personnel and not to any officer working in the Correctional Facility. Puentes certified that Blohm is performing well in the position.

In reply, the appellant states that Farsi was part of the interview process and he had the ability propagate arbitrary and discriminatory animus towards Puentes and others in authority who were a part of the promotional process. He reiterates Farsi's motive to spread animosity to others in retaliation for his union grievance regarding shift differential pay in 2016. The appellant claims it is irrelevant that Puentes and Bannon are members of the union as this has no bearing on the animosity towards him. He emphasizes that Puentes' and Bannon's claims that he was less prepared to assume a supervisory role is a subjective assessment without any proof. The appellant highlights that Blohm does have a disciplinary history and it is only now that the appointing authority claims it has no bearing since the event occurred in 2011. It is the appellant's understanding that Blohm received major discipline including a suspension. The appellant explains the events that led him to receive a counseling notice in 2016 and claims that there was no basis for this notice citing it as an example of the animosity and discrimination that he received. Regardless, the appellant asserts that his counseling notice should not be compared to a major discipline. The appellant describes another incident where he claims he wrongly received a counseling notice where he properly telephoned the facility that he was going to be late due to a breakdown of his personal vehicle on the way to work. He emphasizes that his collective negotiations agreement does not allow him to appeal counseling notices even though they were improper. The

appellant claims, at the very least, the animosity that these events show prevented Puentes and Bannon from being fair and impartial interviewers. He states that his uniform ripped prior to the interview and therefore, as a backup, he wore the short-sleeved version of the uniform and he claims that the interviewers told him that it would not be a problem. The appellant presents that Puentes' animosity towards him has negatively tainted his recollection of the interview because he did in fact answer the interview questions correctly. He states that the statement that Blohm is performing well in the position is misleading as he believes that Blohm recently received a Preliminary Notice of Disciplinary Action with significant suspension time proposed for an incident which occurred in December 2017.

### CONCLUSION

*N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-7 and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on a promotional list provided no veteran heads the list. Additionally, *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant from an eligible list was improper.

In cases of this nature, where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the action is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 445, the Court outlined the burden of proof necessary to establish discriminatory and/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or retaliation by a preponderance of the evidence. Once a *prima facie* showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-discriminatory or non-retaliatory reason for the decision.

If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, after the candidate in the first position indicated that he was not interested, the appellant was in the first position and Blohm was in the

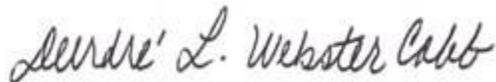
second position. However, it was within the appointing authority's discretion to select any of the top three interested eligibles for each appointment and therefore the appellant and Blohm were reachable for potential appointment. Nevertheless, the appellant alleges that he was bypassed for improper reasons. Specifically, the appellant contends that he was bypassed because of his union activity. However, the appellant has not submitted any documentation, corroborating witnesses or other evidence that indicates that any decision regarding any treatment the appellant received was based on his union activity. In other words, other than his mere allegations, the appellant has not presented any substantive evidence regarding his bypass that would lead the Civil Service Commission (Commission) to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three." *Compare, In re Crowley*, 193 N.J. Super. 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union animus); *Kiss v. Department of Community Affairs*, 171 N.J. Super. 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing). Additionally, the appointing authority has presented a valid business reason for bypassing the appellant, namely, that Blohm scored higher on his interviews and performance evaluations than the appellant. While the appellant argues that its methodology criteria was subjective, he does not present any substantive evidence that the ratings given were inaccurate or based on any invidious motivation. Further, it is not unreasonable for the appointing authority to conclude that Blohm's discipline, which was in 2011, was too far removed to have any bearing on Blohm's ability to serve as Sergeant. Thus, the Commission finds that the appellant did not meet his initial burden of establishing a *prima facie* case of union animus.

### ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 2<sup>nd</sup> DAY OF MAY, 2018



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